This misconduct provides ample additional justification for rejecting the Counterproposal.

CONCLUSION

Platte promised at the beginning of this Response to provide ample good cause for not modifying KOTD's license as per the Counterproposal. It has kept its promise.

Substantial and material questions of fact, bolstered by apposite FCC law, establish that LifeStyle was deceitful in filing and maintaining its Counterproposal, and that it has persistently abused the Commission's rulemaking processes.

The Counterproposal is unworthy of consideration since its maker has shown itself to be unworthy of belief. It should be dismissed or denied. LifeStyle should be compelled to answer for its misconduct to an Administrative Law Judge.

WHEREFORE, the Commission is urged to rule that Platte has shown cause for not modifying KOTD's license. Platte's rulemaking proposal should be granted.

Alternatively, a hearing must be convened to determine the nature and extent of LifeStyle's violations and its fitness to remain a licensee of the Commission. Respectfully submitted,

PLATTE BROADCASTING CO., INC.

By:

Lawrence Bernstein

Its Attorney

LAW OFFICES OF LAWRENCE BERNSTEIN 1818 N Street, NW Suite 700 Washington, D.C. 20036 (202) 296-1800

Attachments

May 4, 1998

APPENDIX I

Declaration of Charles Warga

DECLARATION OF CHARLES WARGA

I, Charles Warga, declare under penalty of perjury that the following statement is true and correct.

I am the President of Platte Broadcasting Co., Inc. ("Platte"), licensee of Station KOTD-FM, Plattsmouth, Nebraska ("KOTD").

This Declaration is being provided to the Federal Communications Commission as part of Platte's Response to a March 13, 1998 Order to Show Cause released by the FCC. The Order asks us to show cause why KOTD's license should not be modified as requested in a Counterproposal by LifeStyle Communications Corp., licensee of Station KJJC-FM, Osceola, Iowa ("LifeStyle"). Mr. James McBride is the President and majority owner of LifeStyle.

For the following reasons, I strongly oppose the Counterproposal and urge the FCC not to modify KOTD's license. I also ask the FCC, if it does not reject the Counterproposal outright, to conduct a hearing to look into LifeStyle's actions over the past year and a half.

Attached to this Declaration are the following six Exhibits:

Ex. 1: James McBride's Declaration as filed with the FCC on October 18, 1996, stating that he is "eager" to build and run an FM station at Papillion, Iowa;

- Ex. 2: a memorandum to me from Mr. McBride dated November 15, 1996 proposing to purchase KOTD and pay me \$250,000 in a consulting agreement "with first payment due 12 months after C-3 operation begins";
- Ex. 3: a memorandum from Mr. McBride to me dated January 8, 1997, proposing to withdraw LifeStyle's Counterproposal "within 5 days of any signed agreement" in return for which Platte would "loan" LifeStyle \$250,000, but "forgive" the "loan" over ten years;
- Ex. 4: draft Settlement, Loan and Escrow Agreements prepared at Mr. McBride's direction, proposing that Platte pay LifeStyle \$15,000 to dismiss the Counterproposal, and then "loan" LifeStyle another \$235,000 supposedly to reimburse it for changing KJJC's frequency, this "loan" also to be "forgiven" over a ten year period;
- Ex. 5: an engineering analysis conducted by Mr.
 McBride's consultant demonstrating various
 means by which KOTD, upgraded to a Class C3,
 could put a city grade signal into downtown
 Omaha; and an Omaha Radio Analysis and Format
 analysis as of November 1996, also used by
 Mr. McBride. These documents were sent to me
 by Mr. McBride in April 1997 to show me the
 economic potential of KOTD as a Class C3
 station; and
- Ex. 6: a "Confidential" counter offer from Mr. McBride dated February 24, 1998, proposing to withdraw the Counterproposal upon payment of \$750,000.

To the best of my knowledge and belief, all of these Exhibits were prepared by Mr. McBride or at his direction.

The purpose of this Declaration is to set forth the facts, as I know them, relating to LifeStyle's Counterproposal and Mr. McBride's attempts, over approximately a year and a

half after filing the Counterproposal, to use that

Counterproposal as leverage either to acquire KOTD as an

upgraded station, or to get Platte to pay Mr. McBride a huge

amount of money to withdraw the Counterproposal.

I am making this Declaration with regret. I have nothing against LifeStyle or Mr. McBride. We are all for fair and open competition. KOTD and KJJC are not even competitors. I would wish Mr. McBride and KJJC well in their business, if they had not tried for the past one and one-half years to take advantage of KOTD for their own financial gain. I have spoken with Mr. McBride many times and have personal knowledge of his intentions as he expressed them to me. This Declaration will help the FCC to understand why Platte believes so strongly that KOTD should not be forced to switch frequencies, and why our own rulemaking proposal should be approved and KOTD be allowed to increase power.

Here are the facts, all of them true and accurate to my personal knowledge and given under penalty of perjury.

On March 21, 1996, at my direction, Platte filed a Petition for Rule Making. The Petition asks for amendment of the FM Table of Allotments to allow KOTD to substitute Channel 295C3 for 295A. Its purpose is to improve KOTD's coverage.

Unfortunately, the only way to that would also require that the license of KJJC be slightly modified, by a one-

channel move from Channel 295C2 to 296C2. This change would not reduce KJJC's coverage and Platte has offered to reimburse LifeStyle for its reasonable out of pocket costs related to the switch.

On April 25, 1996, the FCC issued a <u>Notice of Proposed</u>

<u>Rule Making and Order to Show Cause</u>. It found good cause to

consider our petition and to modify KOTD's license. LifeStyle

was given until June 17, 1996 to show cause why KJJC's license

should not be modified.

On June 17, LifeStyle filed a Counterproposal and Opposition. It asked instead that <u>KOTD</u> be forced to switch frequencies, from Channel 295A to 299A, and that a new Class A be allotted to Papillion, Nebraska. We each filed other pleadings and the March 1998 <u>Order to Show Cause</u> resulted.

I had never met or spoken with Mr. James McBride before LifeStyle's Counterproposal. I was, however, to speak with him numerous times in the weeks and months that followed. Mr. McBride initiated this dialogue and his subject was always money. Mr. McBride often told me, in an effort to acquire KOTD from Platte, about how much more valuable KOTD would be if it was upgraded to a Class C3. On a number of occasions he assured me he could withdraw the Counterproposal any time he wanted and made such statements as: "Don't worry, Charlie. As

soon as we get together on an agreement, that thing will go away within five days." Compare Ex. 3.

Both in the Counterproposal and afterwards (see Exhibit 1), Mr. McBride promises the FCC that he intends to apply for a Papillion station. In all our many conversations, extending over many months, Mr. McBride never once mentioned Papillion or his desire to have a station there. The subject we always discussed was about his buying KOTD -- then withdrawing the Papillion Counterproposal and upgrading the station. Later, when it was clear purchase negotiations weren't going anywhere, Mr. McBride's subject turned to how to get a huge cash payment from Platte without offending the FCC -- and also withdrawing the Papillion Counterproposal.

Mr. McBride first contacted me in approximately
September 1996, by telephone. This was shortly after the
Counterproposal was filed. He upbraided me for filing our
rule making without "picking up the phone and calling" him
first. He said our Petition angered him and that he could not
let it go unanswered. KJJC is a powerful 50,000 watt Class C2
station; Mr. McBride did not fancy being pushed around by a
little 6,000 watt Class A out in the middle of nowhere.

Mr. McBride stated in that first conversation that he had "advertised" KJJC on its current channel for many years

and was not about to change frequencies unless he was properly compensated.

Mr. McBride next paid a visit to Platte's office in November 1996. This was our only face-to-face meeting. Mr. McBride was very pleasant and amiable on this occasion. He visited with me about KOTD and expressed a strong interest in acquiring it -- but as a Class C3. I was interested in a possible sale and we discussed negotiations at that time.

Mr. McBride told me on several occasions that, with the right transmitter location, KOTD could be made into an "Omaha" station. All of our discussions about the purchase of KOTD, which went on for more than a year, were based on KOTD becoming a 25,000 watt station. Of course, that was our intention in filing our rule making petition. Mr. McBride said he could make that happen whenever he wanted, just by dismissing the Counterproposal. He often dangled that possibility before me, as an incentive to sell the station to him.

Mr. McBride and I discussed several scenarios for his acquiring KOTD. On November 15, 1996, he sent me a proposal, attached as Ex. 2. It includes a "Consulting Agreement" which would pay me \$250,000 over five years, "with first payment due 12 months after C-3 operation begins." This offer was made less than a month after Mr. McBride filed his October 18

Declaration (Ex. 1), expressing his intention for a second time to run a new FM station at Papillion." To my knowledge, Mr. McBride never informed the FCC that he was pursuing our proposal instead of his own.

Mr. McBride was so interested in upgrading KOTD that he had his consulting engineer conduct a study on ways and means by which KOTD's Class C3 signal could blanket the Omaha market. He called me regularly, sometimes weekly, with updated reports on his progress toward locating just the right tower site. He also reviewed an analysis of the Omaha radio market, comparing station formats and competitive broadcast facilities. These engineering and marketing studies are attached as Ex. 5. Mr. McBride was actively considering a format change for a more powerful KOTD, after he owned it, and we discussed that. He faxed me this material in April 1997 to demonstrate how valuable, and powerful, KOTD would be as a LifeStyle's Counterproposal was the only thing Class C3. standing in the way of the KOTD upgrade and Mr. McBride let me know in no uncertain terms that he was in control of that.

The engineering in Exhibit 5 shows possible coverage of Omaha by a Class C3 KOTD. Mr. McBride told me he was determined to put a KOTD city grade signal into the heart of downtown Omaha or, to use his words, all the way to "72nd and Dodge," which is considered the center of the City. See pages

1 and 2 of Exhibit 5. Pages 1-4 show the possible KOTD Class C3 coverage of Omaha, and "72nd and Dodge," from the new KOTD upgrade site located closer to Omaha which Mr. McBride had settled on, as measured at two different tower heights. Mr. McBride told me he needed a tower at least 650 feet tall to make KOTD an "Omaha" station, and spent a lot of time during our negotiations trying to get FAA authorization to go up that high. At different times, Mr. McBride placed the value of an upgraded KOTD at between two and four million dollars.

Mr. McBride and I were not able to agree on a mutually acceptable sale price. During our long negotiations, Mr. McBride asked me to let him acquire a substantial interest in Platte, again with the specific intention of upgrading KOTD and withdrawing the Papillion counterproposal, and then reselling KOTD for a fast profit. He promised that if we joined forces, KOTD's "resale" price would skyrocket.

At the end of 1996, during a period when negotiations for KOTD seemed to be going nowhere, Mr. McBride offered to just withdraw the Papillion counterproposal in return for a flat \$250,000 cash payment. I spoke to our FCC counsel at the time, who advised that this would violate FCC rules. After I told him, Mr. McBride revised his proposal in a memo dated January 8, 1997, attached as Ex. 3.

Mr. McBride proposes here to withdraw the

Counterproposal "within five days" in return for a \$250,000 up

front payment set up as a ten-year "loan" from Platte to

LifeStyle. But it was a "loan" in name only since under its

terms LifeStyle would never have to repay a cent of it.

Instead, each year, Platte would just "forgive" one-tenth

(\$25,000) of the "loan." Mr. McBride explains that this

structure is "for tax purposes." His intention as expressed

to me was to find a way to "get around the FCC."

In February 1997, this proposal was revised again in a set of draft legal agreements LifeStyle sent to me, Ex. 4. They were also aimed at getting around the FCC's regulations limiting payments for withdrawing a counterproposal. This proposal would have had us pay \$15,000 for the dismissal of the Counterproposal. We would also have to "loan" Lifestyle another \$235,000 as "reimbursement" for KJJC's one-frequency switch. As with Ex. 3, these "loan" repayments are just forgiven each year for ten years (see the draft Loan Agreement at paragraph 6). I did not believe the FCC would have accepted these agreements as bona fide. Nor did I believe that LifeStyle could justify \$235,000 as reimbursement for a switch of one channel.

After this proposal got nowhere, Mr. McBride and I had several other telephone discussions, from May 1997 to

September 1997, during which he further revised his offers to buy KOTD, always as an "Omaha" Class C3 station. He also repeated his offer to withdraw the Counterproposal for \$250,000 several times. He told me the lawyers would find a way to "paper it over."

I want to again state that, in all the conversations we had for a year and a half, Mr. McBride never expressed an interest in applying for a Class A station at Papillion -- Papillion was never mentioned. All discussions centered on upgrading KOTD, either with LifeStyle as licensee or with Platte continuing to own it following a substantial cash payment to Mr. McBride. This is directly contrary to the proposal in LifeStyle's Counterproposal.

In early 1998, Platte reached agreement with another company, Waitt Radio, Inc. ("Waitt"), to acquire the company and KOTD. An application to transfer control of Platte was filed with the FCC and has been granted. Under its new ownership, Platte will continue to urge the grant of its Petition for Rule Making.

Mr. Kelly Callan, a broker with Kalil & Co., Inc. representing Waitt, approached Mr. McBride in February 1998 to see if there was a reasonable way to get LifeStyle to dismiss the Counterproposal, and also to explore the possibility of

the buyer acquiring KJJC from LifeStyle, as a way to achieve the KOTD upgrade.

Mr. McBride responded on February 24, 1998, see Ex. 6. His price to withdraw of the Counterproposal has increased dramatically: now it is \$750,000.00. I do not know how he expects the lawyers to "paper over" such an outrageous price.

I understand that in mid-April 1998, Mr. Callan made a final approach to LifeStyle. He was told that the withdrawal price remains \$750,000 and that "\$750,000 is not much for allowing KOTD to become a full signal in Omaha." Mr. Callan has provided a declaration confirming this.

To summarize, Mr. McBride first told me that he was angry at Platte for filing our rule making petition, that he had spent a lot of time and money "advertising" KJJC at its frequency and would not move channels unless he was properly compensated. He has used the FCC's rule making processes to block our upgrade, always with the offer to withdraw the Counterproposal for the right price. He has made it clear that he has no interest in a Class A station in Papillion.

For all these reasons and as the attached Exhibits confirm, I ask that the FCC rule that Platte has shown cause why KOTD's license should not be modified, that it either reject LifeStyle's Counterproposal or convene a hearing on the matter as soon as possible.

Respectfully submitted,

Charles Warga

Dated: May \, 1998



DECLARATION

I, James S. McBride, hereby declare under penalty of perjury as follows:

I am the President and majority stockholder of LifeStyle Communications Corporation.

I resided within ten miles of Papillion, Nebraska, from 1984 to 1989, in Western Omaha, at West 163rd Street. I would be eager to move back to the area to run a new FM station at Papillion.

Respectfully submitted,

Dy James & Madrid

Dated: October 18, 1996



FAX 70: 1/02.296-2124

10

Memorandum

To: Steve 402,235.2237

To:

Charlie Warga

From:

Jim McBride 11/15/1996

Date: Subject:

KOTD-FM

Realizing that time is of the essence and that at sometime our attorney's and other advisors will get into this and make it more complicated. I would like to give you are proposal to purchase KOTD-FM, which may be beneficial to you from a tax situation. I have also viewed it somewhat differently than our previous discussions since we are guaranteeing a higher payout than the original that we discussed several weeks a which had a future earnings based on future sale of the property.

Total Purchase Price:

\$1.5 Million

\$750,000 Cash at closing

Consulting Agreement

\$250,000 payable over 5 years with quarterly payments of

\$15,625 .with first payment due 12 months after C-3 operation

begins.

Note:

\$500,000 note at prime rate plus 1%.

Interest only for 3 years.

Principal payments to begin in year four.

Payment amortized over 10 years.

Balloon payment on the remaining balance after 8 years.

Please take a look at this and lets discuss at your earliest convenience.



Memo

TO:

Charlie Warga

FROM:

Jim McBride

DATE:

January 8, 1997

SUBJECT:

Loan

In response to our discussion of last few days, I have to following thoughts.

- 1. Within 5 days of any signed agreement, LiteStyle will withdraw its counterproposal for a Pappilion frequincy.
- 2. Platte Broadcasting will loan LifeStyle \$250,000. This note will be written for a ten year period. Each year Platte will from the note in the amount of \$25,000. We are doing this option for tax purposes. Instead of paying taxes on a \$250,000 total, we would pay on \$25,000 per year. Since you will have to amortize this expense anyway over ten or even possibly 15 years, this should work for you.

Any additional thoughts give me a call

402.296-2124



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SETTLEMENT AGREEMENT

THIS AGREEMENT, entered into by and between Platte Broadcasting Company, Inc. ("PBCI"), and LifeStyle Communications Corporation ("LCC").

WITNESSETH:

WHEREAS, PBCI is the licensee of radio station KOTD-FM, Plattsmouth, Nebraska, which operates on Channel 295A;

WHEREAS, LCC is the licensee of radio station KJJC(FM), Osceola, Iowa, which operates on Channel 295C2;

WHEREAS, PBCI filed comments in a rule making proceeding in MM Docket No. 96-95 before the Federal Communications Commission ("FCC") seeking to change KOTD-FM's operating frequency from Channel 295A to Channel 295C3 which would require LCC to change KJJC's operating frequency from Channel 295C2 to Channel 296C2;

WHEREAS, LCC opposed the proposed change in KJJC's channel and submitted a mutually exclusive counterproposal with the FCC to allot Channel 295A as a new service to Papillion, Nebraska, and to require PBCI to change the frequency of KOTD-FM from Channel 295A to Channel 299A, without requiring KJJC to change channels (hereinafter "Counterproposal");

WHEREAS, PBCI filed further comments with the FCC ultimately seeking to change KOTD-FM's operating frequency from Channel 295A to Channel 295C3 and its community of license from Plattsmouth, Nebraska, to Papillion, Nebraska, and to allot Channel 299A as a new service to Plattsmouth, Nebraska, all of which would continue to require LCC to change KIJC's operating frequency from Channel 295C2 to Channel 296C2;

WHEREAS, LCC is willing to dismiss its Counterproposal in Docket No. 96-95 and change channels if PBCI reimburses its reasonable and prudent expenses in preparing, filing, and prosecuting its Counterproposal and enters into a separate Loan Agreement of even date herewith to provide LCC with financial assistance to change KJJC's channel; and

WHEREAS, the parties wish to establish the terms and conditions pursuant to which PBCI will pay LCC its costs and expenses in preparing, filing and prosecuting its Counterproposal.

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02/04/97	2:20 PM

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained and intending to be legally bound, the parties agree as follows:

- 1. FCC Consent. This Agreement is entered into subject to approval by the FCC, and shall be void unless the FCC shall approve it.
- 2. <u>Joint Request for Approval of Agreement</u>. Within five (5) days of the date of this Agreement, the parties hereto agree to file with the FCC a joint request for approval of this Agreement (the "Joint Request"). The Joint Request shall be accompanied by a copy of the executed Agreement as well as other supporting documentation as required by Section 1.420(j) of the FCC's Rules.
- 3. <u>Withdrawal of LCC's Counterproposal</u>. Concurrently with the filing of the Joint Request, LCC agrees to request dismissal of its Counterproposal.
- Consideration. PBCI agrees to pay to LCC in accordance with the procedure established in paragraph 5, below, the sum of \$15,000 [confirm amount), by certified check or wire transfer of federal funds to an account designated by LCC ten (10) days after the date upon which an order of the FCC approving this Settlement Agreement and dismissing LCC's Counterproposal becomes final. For purposes of this Settlement Agreement, such an order will be deemed "Final" as of the date on which there is pending no application for review, petition for reconsideration, petition for stay, notice of appeal, or any other request for judicial or Commission action with respect to such order and on which the time for filing any such petition or request has expired and on which the FCC may no longer set aside the order on its own motion. In addition, the order will not be deemed final if it contains any terms, restrictions or qualifications which materially limit or conflict with any of the rights of the parties set forth or contemplated herein. In the event the order contains any such terms, restrictions or qualifications and the parties decline, within ten (10) days of release of the order, to accept such terms, restrictions or qualifications, this Settlement Agreement may, upon written notice, be terminated by either party. In the absence of written notice within ten days of release of the order that it will not accept such terms, restrictions or qualifications, a party will be deemed to have accepted such terms, restrictions or qualifications.
- 5. Deposit of Settlement Funds. The parties hereby appoint John M. Pelkey, Esq., and Richard J. Hayes, Jr., Esq., as joint escrow agents ("Escrow Agents"). To secure the payment to be made by PBCI to LCC pursuant to paragraph 4 of this Agreement, PBCI shall deliver to Escrow Agents by certified check or wire transfer on the date that the Joint Request is filed with the FCC the \$15,000 payment to be paid to LCC pursuant to Paragraph 4 of this Settlement Agreement ("Escrow Deposit"). Said Escrow Deposit shall be held and

SETTLEMENT AGREEMENT -- PAGE 2

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disbursed by Escrow Agents in accordance with the terms of the Escrow Agreement by and among PBCI, LCC, John M. Pelkey, and Richard J. Hayes, Jr.

- 6. Loan Agreement. PBCI and LCC are entering into a Loan Agreement, concurrently herewith, whereby PBCI promises to provide funds to LCC to cover the costs of implementing and promoting the change in KJJC's channel which the upgrade in KOTD-FM's class of channel in Docket 96-95 will require.
- 7. Cooperation. PBCI and LCC shall cooperate and use their respective best efforts in the preparation and filing of all FCC filings and related documents that shall be necessary or appropriate to consummate the transactions contemplated by this Agreement, but shall not be required to file any appeals, applications or petitions of any adverse rulings by the FCC or delegated authorities of the FCC. The parties hereto shall cause all such filings to be made as soon as reasonably practicable, and each of them shall prosecute such filings with all reasonable diligence and otherwise cooperate with each other, take no action adverse to one another and use their best efforts to obtain the requisite FCC consent and approval promptly so that a final order may be obtained at the earliest possible date.
- 8. Expenses. Each party to this Agreement shall bear its own expenses, including payment of attorneys' fees, in connection with this Agreement, including preparation of this Agreement and filings and transactions contemplated hereby to obtain FCC approval of this Agreement.
- 9. <u>Binding Agreement</u>. This Agreement shall be binding upon the parties hereto, their heirs, executors, personal representatives, successors and assigns.
- 10. Section Headings. All section headings in this Agreement are for convenience of reference only and are not intended to qualify the meaning of any section or paragraph.
- 11. Counterparts and Effective Date. This Agreement may be executed in counterparts and all so executed shall constitute one agreement, binding on all parties hereto, notwithstanding that all of the parties are not signatory to the original or same counterpart. This Agreement shall be effective as of the date on which the last counterpart is executed.
- 12. Entire Agreement. This Agreement, the Escrow Agreement, and the Loan Agreement executed on the same date herewith contain the entire understanding between the parties and supersede all prior written or oral agreements between them respecting the subject matter hereof, unless otherwise provided herein. There are no representations, agreements, arrangements or